No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S PETITION FOR A REHEARING.

LEO R. FRIEDMAN,
Russ Building, San Francisco 4,
SOL A. ABRAMS,
Kohl Building, San Francisco 4,
Attorneys for Appellant and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 10,939

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Salvatore Maugeri, appellant above named, and respectfully petitions that the decision of this Court, rendered herein on the 20th day of October, 1945, be set aside and a rehearing of the cause be granted on each and all of the following grounds, to-wit:

(a) The opinion and decision of this Court should be amplified (for the reasons hereinafter stated) in order to disclose whether the judgment of the lower Court was affirmed on the merits, after a consideration of the points raised by appellant, or because of a

procedural defect in not having presented said matters to the lower Court and reserved an exception to an adverse ruling thereon;

(b) If the decision was on the merits, the opinion of this Court has misapplied the doctrines heretofore announced in the case of *Parmagini v. United States,* 42 Fed. (2d) 721, and *Gargano v. United States,* 140 Fed. (2d) 118.

THE DECISION SHOULD BE AMPLIFIED BY SETTING FORTH THE GROUNDS ON WHICH THE JUDGMENT WAS AFFIRMED.

The decision of this Court reads as follows:

"The judgment of the District Court is affirmed."

No grounds are given as the basis for the Court's decision.

One of the points raised on appeal was that the two offenses set forth in the indictment were disclosed by the evidence to be but one offense and that the lower Court, in ordering the sentences to run consecutively on the two counts of the indictment, inflicted double punishment on appellant for but one offense.

At oral argument Mr. Justice Mathews suggested that this matter should have been presented to the trial Court under the doctrines of the *Parmagini* and *Gargano* cases, supra.

Another point raised on appeal was that the evidence was insufficient to establish the charge set forth in the second count of the indictment. The Govern-

ment objected to a consideration of this point on the ground that no motion for a directed verdict had been made at the close of all the evidence in the case. Appellant countered with the proposition that this Court had the power to consider such point, even though it had not been properly presented to the trial Court nor the point preserved by a proper exception.

In the *Parmagini* and *Gargano* cases, supra, it is held that where double punishment for the same offense has been meted out by a trial Court, the trial Court, on motion, may correct this situation by modifying the judgment and sentence pronounced. These cases further hold that such motion may be made at any time, even though the term of Court has expired, and that the action of the trial Court constitutes a final judgment from which an appeal to this Court will lie.

If the decision of this Court, as to the double punishment, is based merely on a procedural matter, viz.: that an opportunity should first be given to the trial Court to correct the judgment and an appeal taken from any adverse action by the trial Court, then the opinion of this Court should so state. Otherwise, if such motion be made to the trial Court the decision of this Court would be construed as a decision on the merits and appellant would be foreclosed from receiving any relief if the facts justify relief.

On the other hand, if the decision of this Court on this point was on the merits then the decision should so state in order that, in certiorari proceedings to the

Supreme Court of the United States, no question would arise as to the issue involved and decided by this Court.

The same holds true for the second point raised by appellant on appeal, *i.e.,* the insufficiency of the evidence to establish the charge set forth in the second count. On certiorari proceedings to the Supreme Court, an examination of the record might well lead to the conclusion that this Court refused to consider such point on the merits and as such consideration, under the circumstances, would be a matter of discretion with this Court, its action, in refusing to exercise such discretion in favor of appellant, would not be subject to review by our highest tribunal.

It is respectfully suggested, therefore, that the decision of this Court be amplified merely by stating whether such decision was rendered on the merits of the two points raised by appellant, or whether the Court refused to consider either one or the other of said points due to a procedural defect.

THE COURT, IF THE DECISION WAS ON THE MERITS, MISCONSTRUED THE DOCTRINE ANNOUNCED IN THE CASES OF PARMAGINI AND GARGANO.

Assuming that this Court decided the case on its merits we further assume that it decided the question of double jeopardy on the authority of *Parmagini v. United States* and *Gargano v. United States,* supra.

We believe that the doctrines announced in such cases have been misapplied in the case at bar.

In the case of *Parmagini v. United States,* 42 Fed. (2d) 721, this Court recognized the doctrine that where a transaction was an entity only one offense was committed even though the acts, if divided by an appreciable period of time, could, under proper evidence, consist of two offenses.

In the case at bar the rule in the *Parmagini* case is peculiarly applicable. No appreciable period of time elapsed between the acts which might be construed as a facilitating of concealment of the opium by appellant and the acts which might be construed as facilitating the transportation of such opium. The test laid down in all the cases is whether the same evidence would be required to prove both offenses charged or whether additional facts are necessary to prove one of the offenses charged as distinguished from the other. This rule is not to be applied in its abstract aspect but must be applied by considering the facts of each individual case. Thus, it follows that if the evidence shows that the same testimony is necessary to establish each offense, then but one offense has been committed.

The record in this case discloses that the only evidence in the case is that relating to the occurrences from eleven o'clock on Saturday evening, August 12, until three thirty in the morning of August 13. Identically the same evidence was relied upon to support count two of the indictment as was relied upon to support count one. No facts could be eliminated from this testimony as to count one and still leave sufficient to establish the charge set forth in count two. The

converse is equally true. No facts could be eliminated from the testimony as to count two and still leave sufficient to establish the charge in count one. Under such circumstances the rule in the *Parmagini* case applies and we believe this Court erred in placing a different construction upon the language used in that decision.

In *Gargano v. United States,* 140 Fed. (2d) 118, the *sole question involved* was whether the indictment stated two separate and distinct offenses. We conceded that the indictment in the instant case set forth two separate and distinct offenses, our contention being that *the evidence disclosed but one offense.* The *Gargano* case is not controlling and we again believe that the Court erred in basing its conclusion on such decision, if in fact the Court did so.

For the foregoing reasons we respectfully submit that a rehearing be granted.

Dated, San Francisco,
November 19, 1945.

Respectfully submitted,
Leo R. Friedman,
Sol A. Abrams,
Attorneys for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
November 19, 1945.

Sol A. Abrams,
Of Counsel for Appellant and Petitioner.